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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 794

IN THE MATTER OF:

RAINBO EXPRESS, INC.,

BANKRUPT.

JAMES B. RICHARDSON, TRUSTEE,

Petitioner,

vs.

NATIONAL ACCEPTANCE COMPANY OF CHICAGO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Court of Appeals on rehearing is reported in 179 F. (2d) 1, and in the Record, pp. 55-62.

QUESTIONS PRESENTED.

The following questions, decided by the Court of Appeals, were answered, the first in the positive, and the second in the negative:

1. Does an interstate motor carrier have such an interest in his Certificate of Public Convenience and Necessity issued to him by the Interstate Commerce Commission as may be made the subject of a chattel mortgage?

2. Does the execution by an interstate motor carrier of a chattel motrgage upon his Certificate of Public Convenience and Necessity require the approval of the Interstate Commerce Commission?

ARGUMENT.

The Bankrupt in the case at bar had a transferable interest in the Certificate of Public Convenience and Necessity issued to him by the Interstate Commerce Commission. (§ 212(b), Part II, Interstate Commerce Act, as amended, § 312(b), Title 49 U. S. C.) This statute declares that, "any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." A license or permit which may be transferred is "a valuable right with attributes of property," and may be levied upon by execution. *Rowe* v. *Colpoys*, 137 F. 2d 249. This proposition is concisely stated in the headnote to *Deggender* v. *Seattle Brewing & Malting Co.*, 83 Pac. 898 (Wash. 1906), as follows:

> "Where the right to transfer a liquor license is recognized by statute, such interest or right to transact the liquor business becomes a valuable property right, subject to barter and sale."

And

> "in the absence of statutory provisions to the contrary, any personal property which is capable of being sold may be the subject of a mortgage." 14 C. J. S. 612, Chattel Mortgages, §21.

A corporation which is authorized to sell its franchises is authorized to mortgage them. *Willamette Mfg. Co.* v. *Bank of British Columbia*, 119 U. S. 191, 193. The bankrupt in the instant case was authorized to mortgage its certificate even though a transfer thereof was subject to the control of the Interstate Commerce Commission. *First National Bank of Weatherford* v. *Holliday*, 47 F. 2d 67; *Brown, et al.* v. *Smith, et al.*, 7 Fed. Car. Cas. ..... (C. C. H. Fed. Car. Rep., Current Cas., ¶ 80,555, pp. 2167, 2168-

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In *Rowe* v. *Colpoys*, 137 F. 2d 249 (App. Ct. D. C. 1941), 148 A. L. R. 488 the court considered the question whether a license to sell alcoholic beverages issued by the Alcoholic Beverage Control Board of the District of Columbia was subject to levy under an execution. A transfer of the license was controlled by statute, the pertinent parts of which, as appears from the court's opinion, provide that, " 'The right, power and jurisdiction to issue, *transfer*, revoke and suspend all licenses under this chapter shall be vested solely in the board * * *. The Commissioners shall have specific authority to make rules and regulations for the issuance, *transfer* and revocation of licenses * * * .' " (Court's italics and ellipses.) The Court held that since "Express provision for transfer and assignment of such a license as is involved in the present case, was made in the statute which provides for its issuance in the first place," it was subject to levy under an execution. That decision, as stated by the Court, is based on the principle that "a license which by express statutory provision is made subect to transfer," is "a valuable right with attributes of property," even though the transfer thereof is controlled by some public authority. Applying the reasoning in that case to the case at bar, it is plainly seen that the bankrupt's certificate "was a valuable right with attributes of property," and, therefore, mortgageable.

In *First National Bank of Weatherford* v. *Holliday*, 47 F. 2d 67, 5 Cir. 1931, the controversy was between a trustee in bankruptcy and the holder of a chattel mortgage on a certificate of public necessity and convenience issued by the Railroad Commission of Texas to operate a public

bus-line. The Texas statute, as set out in the court's opinion, provides:

> "'Any right, privilege, permit, or certificate held, owned or obtained by any motor-bus company under the provisions of this Act, may be sold, assigned, leased or transferred, or inherited; provided, however, that any proposed sale, assignment, lease or transfer shall first be presented in writing to the Commission for its approval or disapproval * * *.
>
> "'Every application filed with the Commission for an order approving the lease, sale, or transfer of any certificate of convenience and necessity * * * shall be accompanied by a filing fee in the sum of $25.00, which fee shall * * * be retained by the Commission whether the lease, sale, or transfer * * * is approved or not'."

In that case, the chattel mortgage on the certificate was duly recorded, but "permission to mortgage was neither asked nor received from the railroad commission." Both the referee in bankruptcy and the District Judge held that the mortgage was invalid, but on different grounds. In reversing the judgment of the District Judge, the Court of Appeals said:

> "The view of the District Judge, that since there was no express statutory authority to mortgage none can be implied, runs counter to the considered opinion of the Supreme Court in *Willamette Mfg. Co.* v. *Bank of British Columbia,* 119 U. S. 192, holding that the power of sale of a franchise includes the power to mortgage it, while the view of the referee that the mortgage is invalid because the statutory procedure for a sale was not followed, exalts the form over the substance."

Petitioner contends that Rule 1(d) of the Commission required the Commission's approval of the chattel mortgage upon the bankrupt's certificate. His contention is refuted by the Director of the Bureau of Motor Carriers of the Commission, who states (R. 50): "There is noth-

ing in the Interstate Commerce Commission Act nor the regulations promulgated by the Interstate Commerce Commission which prohibits a motor carrier from executing and delivering a chattel mortgage upon its certificate, nor does such action require the prior approval of the Commission." With respect to a foreclosure of the mortgage, he states that "there is nothing in the Interstate Commerce Commission Act nor in the regulations promulgated thereunder that requires any approval of the Commission before such foreclosure. However, any purchaser at such sale must file proper applications with the Commission and secure its approval before the rights can be transferred to such purchaser as an operator." These statements of the Motor Bureau Director, construing Rule 1(d), were confirmed by the Commission on August 4, 1949, by an Order revising Rule 1(d), designated in the Code of Federal Regulations as Section 179.1(d), set out in Fed. Reg. Vol. 14, pp. 5049-5050. So much of the Order as is here material is as follows (R. 37):

> "It appearing, that there is need for revision of § 179.1(d) of the said rules to make more clear the meaning intended, and
>
> "It further appearing, that the proposed changes are merely clarifying and do not involve any change in substance:
>
> "*It is ordered,* That § 179.1(d) be revoked and the following § 179.1(d) be substituted in lieu thereof:
>
> "§ 179.1. *General* * * *.
>
> "(d) No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided. The mere execution of a chattel mortgage, deed of trust, or other similar document, does not constitute a transfer within the meaning of these rules, and does not require the approval of the Commission, unless it embraces the conduct of the operation by a person other than the holder of the operating right."

Petitioner's right to the bankrupt's certificate (subject, of course, to the mortgage lien thereon) derives from section 70 of the Bankruptcy Act which provides that certain enumerated types of property belonging to the bankrupt shall pass to the trustee, among them "(5) property, including rights of action which prior to the filing of the petition he could by any means have transferred or which might have been levied upon or sold under judicial process against him, * * *." Petitioner's claim to the certificate under this provision of the Bankruptcy Act is a recognition by him that the certificate is property which the bankrupt could have transferred or which could have been levied upon, and is therefore mortgageable property. He contends, however, that although the certificate passed to him as trustee in bankruptcy, it was not mortgageable, and in support of his contention he cites cases in which liquor licenses which were held to be not mortgageable were, nevertheless, held to pass to trustees in bankruptcy. The cases cited are, *In re McArdle*, 126 Fed. 442 (D. C. Mass., 1903); *Tracy* v. *Ginzberg*, 189 Mass. 260, 75 N. E. 637 (Mass., 1905), aff'd 205 U. S. 170; *In re Flaherty*, 184 Fed. 962 (E. D. Va., 1911). Petitioner overlooks the statutes which controlled the decisions in these cases. In the Massachusetts cases the Licensing Board, acting under statutory power, permitted liquor licenses to pass to trustees in bankruptcy, but did not permit the licensees to transfer such licenses. The decision in the Virginia case was controlled by a statute which declared that a liquor license shall confer upon the licensee only a "personal privilege." Uniquely, that statute permitted the licensee to assign such "*personal privilege,*" but did not permit him to mortgage it. Thus, under the law of Virginia a liquor license passes to a trustee in bankruptcy because the statute authorizes the licensee to transfer it, but the licensee may not mortgage such license because the statute does not authorize him to do so. Under that peculiar statute the holder

of a liquor license has a property right in it which he may transfer to another, but which he may not mortgage. This anomalous situation is due to the rule that the selling of liquor is not a natural or an inalienable right, but only a right that is created by the legislature, and the enjoyment thereof may be curtailed or destroyed by the power which created it, because it is not such a right of property as comes under the protection of the Fifth Amendment to the Constitution. *Giozza* v. *Tiernan,* 148 U. S. 657, 661; *Crowley* v. *Christensen,* 137 U. S. 86, 90-91; *Tracy* v. *Ginzberg,* 205 U. S. 170, 177.

Petitioner's reasons for granting his petition are without merit. At pages 5 and 15 of his petition and brief he sets out a provision of the Interstate Commerce Act which, he says, presents an important question of federal law which should be settled by this Court. That provision reads: "No certificate issued under this chapter shall confer any proprietary or property rights in the use of public highways." That provision of the Act was in no way drawn into this case or touched upon by the Court of Appeals. Petitioner's statement (Brf. 15) that the Court of Appeals has decided "that a motor carrier has such property interest in the use of the public highways," is fantastic and plainly absurd.

Petitioner says that the decision of the Court of Appeals is probably in conflict with *United States* v. *Resler,* 313 U. S. 57. The *Resler* case did not involve any such question as is involved in the case at bar. In that case, a criminal information charged a transferee of a certificate with operating interstate motor carrier business without approval of the transfer by the Commission. The question in that case was whether operating that business without the Commission's approval was a violation of law. The case at bar does not involve a transfer of the certificate, but only the creation of a lien thereon. The bankrupt is an Indiana corporation and has its principal office in South Bend

(R. 28), and the execution of the mortgage by the bankrupt did nothing more than create a lien on its certificate. See *Thurston* v. *Buxton,* 218 Ind. 585, 589, 34 N. E. 2d 549, 550 (1941), where the Supreme Court of Indiana said that a chattel mortgage is not an assignment, as it "creates only a lien." The crucial fact in the *Ressler* case was that the transferee operated the business of an interstate motor carrier, but no such fact exists in the case at bar, as the Respondent is a mortgagee and not a transferee and had nothing to do with the operation of the bankrupt's business.

Petitioner states as a reason why certiorari should be granted, that the decision of the Court of Appeals is probably in conflict with the decisions of this Court in *Thomas* v. *Railroad Co.,* 101 U. S. 71, and *Rochester Railway Co.* v. *City of Rochester,* 205 U. S. 236. Neither of these decisions has any bearing on any question that is involved in the instant case. In *Thomas* v. *Railroad Co.,* the sole question which this Court was called upon to decide was whether a railroad corporation could lawfully lease all of its road, rolling stock and franchises without legislative authority. This Court held that such a lease is *ultra vires* and void. This Court said, p. 84:

> "The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. * * * 'a corporation cannot lease or alien any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority'."

In *Rochester Railway Co.* v. *City of Rochester,* 205 U. S. 236, 247 *et seq.,* the sole question was whether an exemption which was granted to the railway company, exempting it from a statutory duty to pave certain parts of the streets on which the tracks lay, passed to its lessee, another corporation, under the terms of a statute which provided that upon a sale by a corporation of its franchises, the

" 'estate, property, rights, privileges and franchises should vest in and be held and enjoyed by' the purchasing corporation." The court held that an *exemption* is not a property right and did not pass to the lessee of the railway company's franchise.

Petitioner states as a reason why certiorari should be granted, that the Court of Appeals misinterpreted and misapplied the holdings of this Court in *Hyde* v. *Woods,* 94 U. S. 523, *Page* v. *Edmunds,* 187 U. S. 596, and *Chicago Board of Trade* v. *Johnson, et al.,* 264 U. S. 1. Petitioner seems not to perceive the purport of these decisions and the reason why they were cited by the Court of Appeals. These decisions were cited to point out the fallacy of petitioner's contention that the bankrupt's certificate was not property, because a transfer thereof was subject to the approval of the Commission. The Court of Appeals cited these cases to show by way of illustration to point out that a right of property does not lose its character merely because a transfer thereof is subject to approval of some private or public authority.

Conclusion.

The Petition for a Writ of Certiorari states no reason why the decision of the Court of Appeals should be considered by this Court. As shown above, the reasons stated in the petition are specious. And the decision by the Court of Appeals of the Questions Presented is clearly correct and accords with all federal and state decisions. The Petition should be denied.

Respectfully submitted,

HAROLD J. FINDER,
Counsel for Respondent.